

STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

07 MAR -7 AM 10: 01 FOURTH JUDICIAL DISTRICT

BY \_\_\_\_\_ DEPUTY

Clear Channel Outdoor, Inc., a Delaware  
corporation, f/k/a Eller Media Company,

HENNEPIN CO. DISTRICT  
COURT ADMINISTRATOR

Plaintiff,

v.

City of Minnetonka,

Defendant.

***Amended ORDER GRANTING  
IN PART AND DENYING IN  
PART PLAINTIFF'S REQUEST  
FOR RECONSIDERATION,  
AND ISSUING A  
PRELIMINARY INJUNCTION***

Court File No. 27-CV-06-23485

On February 15, 2007, the Court held a hearing regarding Clear Channel's motion for reconsideration of its request for a temporary injunction.

**APPEARANCES:**

Michael A. Ponto, Esq., Faegre & Benson, L.L.P. appeared for Clear Channel Outdoor, Inc., ("Clear Channel").

John M. Baker, Esq., Greene Espel, P.L.L.P., appeared for Defendant, City of Minnetonka ("Minnetonka").

**A. Procedural history and background**

In a memorandum opinion dated January 30, 2007, this Court denied Clear Channel's motion for a temporary injunction. On February 1, 2007, Clear Channel sought reconsideration of that decision. By order dated February 7, 2007, this Court granted reconsideration of that order, based upon new facts and circumstances articulated by Clear Channel in its motion for reconsideration. *See Minn. Gen. R. Prac. 115.11.*

The Court refers to its two prior orders for the factual, legal and procedural background of the case. In summary, Clear Channel originally filed a motion for a preliminary injunction which would allow it to “power-up” two large electronic billboards near highways I-394 and I-494 in the City of Minnetonka, and to operate the billboards to permit eight advertising spots changing every eight seconds. The Court’s January 30, 2007 order denied Clear Channel’s motion to activate the two electronic billboards at highways I-394 and I-494 in Minnetonka, and to allow Clear Channel to operate in a manner in “which such illumination is not kept stationary or constant in intensity and color at all times when such sign is in use.” Minnetonka, Minn., Code of Ordinances § 300.02 (117) [hereinafter “City Code”].

The Court’s order specifically denied Clear Channel’s motion to prohibit Minnetonka “from interfering with the operation of [Clear Channel’s] signs, and particularly to prohibit Minnetonka from interfering with signs which change electronic messages every eight seconds. The record before the Court focused on the whether the eight-second ad changes violated city, state, and federal law, and whether the changes posed a distraction to drivers, and a risk to public safety. The Court also upheld Minnetonka’s emergency moratorium statute passed on December 18, 2006, which the Court understood to ban any new LED billboards that had advertising which changed more than once each hour.

The decision was two days old when Clear Channel submitted a request for reconsideration on February 1, 2007, pursuant to Minn. Gen. R. Prac. 115.11. Clear Channel sought reconsideration because Minnetonka construed the moratorium to ban any use of the billboards, including ads that changed no more than once each hour. The Court had construed the moratorium to allow such use, in light of its language, Minnetonka’s concern for rapidly-changing ads and their potential impact on driver distraction and public safety, and the entire

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<sup>1</sup> The Court’s March 6, 2007 order is amended to correct several typographical errors.

record of the case.

Nonetheless, despite the lack of focus in the January 19, 2007 hearing on the moratorium's ban on "any electronic display," that language is now the critical issue before the Court. At the temporary injunction hearing before the Court on January 19, 2007, neither Minnetonka nor Clear Channel focused on the language in the emergency moratorium banning any electronic display. The argument at the temporary injunction hearing focused on whether eight second changes in the billboard signs constituted "motion" under local, state, or federal law, and posed a risk of distraction and driver safety.

At the January 19, 2007 temporary injunction hearing, Clear Channel asserted that advertising messages which changed once every eight seconds complied with federal, state and local law. In its January 30, 2007 order, the Court agreed with Minnetonka that a change every eight seconds would appear to violate Minnetonka's ordinance prohibiting sign "illumination [which] is not kept stationary or constant in intensity and color at all times when such sign is in use." City Code § 300.02 (117). Based upon the Court's January 30, 2007 ruling,<sup>2</sup> Clear Channel now submits that while the litigation unfolds, it would rather have the signs operate with ad changes once each hour as provided in the December 18, 2006 moratorium, than not at all.

Clear Channel maintains that the equities now favor its motion for a preliminary injunction, because a change every hour would not violate Minnetonka's 41-year sign ordinance; a change every hour could not reasonably be considered "illumination [which] is not kept stationary or constant in intensity and color at all times when such sign is in use." City Code § 300.02 (117). For similar reasons, Clear Channel asserts that Minnetonka's focus on the brightness of the signs reveals the weakness of Minnetonka's position, because Minnetonka's

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<sup>2</sup> In its motion for reconsideration, Clear Channel makes clear that it told Minnetonka that it could live with ad changes every hour in lieu of an outright ban, and that it told Minnetonka of its position at the December 18, 2006 meeting of the Minnetonka City Council. This position was not part of the Court record prior to Clear Channel's

ordinances do not specifically limit the brightness of signs. The ordinances only address signs that are “revolving and moving,” and those that are “flashing, blinking or animated . . . but not limited to traveling lights or any other means not providing constant illumination.” City Code §§ 300.30 (1)(b)-(c). The moratorium language itself acknowledges that “the City needs to study not only the changeability of the signs, but also the brightness, which city ordinances currently do not address.” Ordinance No. 2007, Minnetonka City Code Moratorium (Feb. 26, 2007).

In summary, Clear Channel asserts that signs which change messages once every hour neither violate Minnetonka’s moving message sign ordinance nor pose the issues of driver safety and distraction asserted by Minnetonka. Moreover, Clear Channel contends that a moratorium which prohibits any use of its two electronic billboards is arbitrary and punitive, and deprives it of its existing right to improve the billboards. Clear Channel points out that Minnetonka has many signs and billboards within its city limits that are illuminated electronically, including LED signs, and that the two signs sit in an area awash with illumination and commercial activity.

Minnetonka disagrees with Clear Channel’s position, asserting that a change in advertising spots once an hour represents “motion” which is a change in constancy, and prohibited under Minnetonka City Code § 300.02 (117). Minnetonka contends that any change, on any basis, represents prohibited motion under its ordinance. Apart from its claim that any motion is prohibited motion, even if it happens once a day, once a week, or once a year, Minnetonka further argues that the bright illumination of the signs presents safety issues which justify the moratorium. Minnetonka rejects any offer by Clear Channel to calibrate the signs to road conditions, and rejects Clear Channel’s assertion that the lighting of the LED signs is no brighter than a conventional billboard. Finally, Minnetonka maintains that it has the legal authority to adopt and extend the December 18, 2006 moratorium, under its legislative powers to

address matters of public health, safety, and welfare, because the brightness of the signs, and issues of motion, concern matters of public safety.

The parties are thus intractably opposed: Minnetonka insists that the two expensive electronic billboards remain dark and powered off, and Clear Channel insists that this is punitive, arbitrary, and irrational, when it is willing to control the illumination to any degree acceptable to the Court, and to change the signs only on a schedule prescribed by the Court, whether that be hourly, weekly, monthly, yearly or not at all.

Despite their divergent positions, both Clear Channel and Minnetonka agree that the Court's January 30 order must be modified to reflect that Minnetonka has barred any electronic use of the billboards, rather than simply eight second changes or changes which occur once each hour. Minnetonka is satisfied that Clear Channel's motion for a temporary injunction should still be denied; Clear Channel is convinced that its motion must now be granted.

## **B. Legal analysis**

### **1. The Motion for Reconsideration**

In its February 7, 2007 order, the Court concluded that Minnetonka's application of its emergency moratorium to bar any "electronic display," rather than moving or flashing signs, justified Clear Channel's request to file a motion for reconsideration. The Court concluded that "Clear Channel should have an opportunity to argue that a moratorium on 'any electronic display,' rather than moving or flashing signs, justified Clear Channel's request for reconsideration." The Court stated that "Clear Channel should have an opportunity to argue that a moratorium on 'any electronic display' is an unlawful moratorium, and arbitrary and capricious, and to develop an appropriate record." (Order at 3, Feb. 7, 2007.) The Court denied Clear Channel's request for reconsideration to the extent it addressed the eight-second changes in message, intensity, and color, and Clear Channel's request for reconsideration as it relates to

Minnetonka's authority under Minnesota law to regulate signs, or to impose a moratorium. (Order at 2, Feb. 7, 2007); *see* Gen. R. Prac. 115.11 advisory committee comment, ("Motions for reconsideration are not opportunities for presentation of facts or arguments when the prior motion was heard.").

Based upon the arguments and record leading up the Court's January 30 decision, the Court reasonably concluded that the focus of Minnetonka's moratorium, and opposition to Clear Channel's motion for a preliminary injunction, was based upon electronic ads that change in color, constancy, or illumination, and involve motion. This is evident from any reasonable review of the record, and the legal authority relied upon by Minnetonka for its actions. First, the 41-year old Minnetonka billboard ordinance permits electronic signs if the illumination is "kept stationary or constant in intensity and color at all times when such sign is in use." City Code § 300.02 (117). Minnetonka's official charged with interpreting the ordinance testified that LED technology is itself not prohibited under Minnetonka's ordinance, unless electronic images are "not kept stationary or constant in intensity and color all times when such sign is in use." Minnetonka's official testified that, "The mere fact of the image changing, whether it be on a daily or weekly basis, I would not say is a specific violation of the revolving or moving sign section under [the ordinance]."<sup>3</sup>

Second, the moratorium adopted by Minnetonka on December 18, 2006 states in its preamble that the reason for the moratorium is that, "The sign industry has developed new technology that includes electronic and digital displays that shift on a frequent basis." Pending a 60-day study, the moratorium bars the "installation, construction, reconstruction, or expansion of any sign that has any revolving, moving, flashing, blinking, or animated characteristics, any messages that change more frequently than once an hour, or any electronic display . . . ."

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<sup>3</sup> *See* Klemp-Wischnack Dep., Ex. 2 at 22:21, attached to Hennigan Aff., Jan. 12, 2007.

*Emergency Ordinance Establishing Regulations for Electronic Signs*, § 3.01, Minnetonka, MN (Dec. 18, 2006).

Prior to the motion for reconsideration, neither Minnetonka nor Clear Channel provided the Court with the transcript of the City Council meeting on December 18, 2006, which explains in more detail why Minnetonka adopted language which prohibited “any electronic display,” regardless of how often an ad changes. The parties have now provided the Court with that transcript, and additional affidavits which relate to the reason for the moratorium and the basis for Minnetonka’s position.

The moratorium by its own terms expired on February 16, 2007, or could be extended for an additional 60 days if the emergency justifying the moratorium still existed. On February 16, 2007, Minnetonka’s City Council extended the original moratorium for an additional 60 days, or through at least April 16, 2007. The February 16, 2007 ordinance removed the language in the December 18, 2006 ordinance that permitted signs which changed every hour, stating that “the city council . . . finds that the language of Ordinance No. 2006-26 has been misconstrued to allow an electronic sign that changes every hour, despite other provisions in that ordinance and despite the city council’s specific intent to the contrary.”<sup>4</sup>

In its motion for reconsideration, Clear Channel argues that Minnetonka’s position is arbitrary and capricious. First, Clear Channel observes that the two LED signs at issue are located in commercial areas on highways I-394 and I-494 where there are already many illuminated signs, and that LED signs are lawful under Minnetonka’s existing sign ordinance. Clear Channel argues that Minnetonka’s decision to ban its signs under the moratorium is punitive, arbitrary, and irrational. Second, Clear Channel asserts that Minnetonka has no legitimate emergency under its emergency moratorium powers, because the two LED signs

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<sup>4</sup> Ordinance No. 2007-An Emergency Ordinance Replacing Ordinance No. 2006-26 Regarding Electronic Signs

involve no flashing, animation, or motion, and with respect to Minnetonka's concern for brightness, Clear Channel is willing to work with Minnetonka's engineers to make the signs as dark or light as need be consistent with visibility. Clear Channel asserts that the illumination of the LED signs would be no different than normal billboards using conventional electric lighting. Clear Channel avers that the emergency moratorium is unjustified under Minnetonka's moratorium powers, which are limited to emergency ordinances "necessary for the immediate preservation of the public peace, health, safety, or welfare." City Code § 3.07 ("Emergency Ordinances"). Third, Clear Channel points to the minutes of the City Council meeting where the moratorium was adopted, and underscores language suggesting that Minnetonka intended to teach Clear Channel a lesson, and that its intent was punitive. Finally, Clear Channel maintains that an LED sign which has static illumination complies with Minnetonka's zoning ordinance prior to the moratorium, and that it is being deprived of a lawful use of its two billboards, at a large financial cost.

Minnetonka rejoins that the moratorium flows from its power to impose an emergency moratorium to protect public health, safety, and welfare; that the moratorium applies to all new electronic billboards after December 18, 2006; that the moratorium has been even-handedly applied to all persons seeking to activate new electronic billboards; and that it is entitled to study the issues of brightness and motion involved in the relatively new technology before allowing the billboards to operate. Minnetonka points out that Clear Channel does not approach the Court in an equitable position, because it activated the billboards in violation of an existing Minnetonka ordinance which prohibited changing images, and violated the City's electrical code. Minnetonka asserts that Clear Channel has no standing to challenge the moratorium, because its actions were unlawful before the moratorium under Minnetonka's 41-year old ordinance



prohibiting signs with messages that change over time.

## **2. Preliminary Injunction Analysis**

The Court has previously considered Clear Channel's request for a temporary injunction in light of Minn. R. Civ. P. 65 and the five factors set forth in *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn 1965). The five Dahlberg factors are (1) the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief; (2) the harm to be suffered by the plaintiff if the temporary restraint is denied, as compared to that inflicted on the defendant if the injunction issues pending trial; (3) the likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief; (4) the aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the state or federal statutes; and (5) the administrative burdens involved in judicial supervision and enforcement of the temporary decree. *Dahlberg Bros.*, 137 N.W.2d at 321-322.

### **a. The Relationship of the Parties**

The Court has previously analyzed the relationship of the parties in its January 30, 2007 order, and incorporates that discussion by reference. What has changed since the January 30, 2007 order is that the parties have supplemented the record with a transcript of the December 18, 2006 City Council meeting when the moratorium was discussed, along with new affidavits.

The Court, accordingly, augments the analysis in its January 30, 2007 decision by describing additional facts that were not previously before the Court at the time of its original decision. What is new to the Court is evidence that Clear Channel had offered, on December 18, 2006, while this litigation was pending, in response to its understanding of the language of the moratorium, to change messages on the two signs every hour instead of every eight seconds. The Court further notes that at the City Council meeting on December 18, 2006, at least two City

Council members proposed that Minnetonka adopt an ordinance which would expressly allow Clear Channel to change messages every hour. However, because of concerns about the illumination of the signs, the new technology, Clear Channel's violations of Minnetonka's electrical Code and sign ordinance, and concerns about how to handle other new requests, the motion failed or was withdrawn. Instead, Minnetonka adopted a moratorium on any electrical display pending a 60-day study, which was extended on February 18, 2007 to include another 60 day period of study.

At the February 15, 2007 hearing on Clear Channel's motion for reconsideration, Clear Channel made the following additional points or concessions.

First, as a litigation compromise while this case is pending, Clear Channel is willing to keep the billboards completely static with no changes, or to make changes on any basis ordered by the Court. Clear Channel pointed out that billboard companies routinely and customarily periodically change billboard messages under the conventional non-LED technology, and that this would be a permitted historic use of the two billboards. Minnetonka rejoined that Clear Channel was free to remove the LED signs and revert to the original billboard signs that had been in place for many years, but that any change using the LED technology, whether, daily, weekly, or even yearly would, in Minnetonka's view, violate Minnetonka's sign ordinance.

The Court finds that Minnetonka's argument that a change each year constitutes prohibited motion weighs against Minnetonka and in favor of Clear Channel, because the argument is a strained and unreasonable interpretation of Minnetonka's sign ordinance which prohibits changes or motion.<sup>5</sup> The same is true for a change each week, each day, or each hour. The argument of Minnetonka's counsel that occasional changes constitute prohibited motion is unsupported by the evidentiary record. Moreover, it is undisputed that Clear Channel has the

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<sup>5</sup> Minnetonka's counsel responded directly to a question from the Court by saying that a change once each year

right to change its billboards under the conventional non-LED technology, and that such changes are an accepted historic use.<sup>6</sup> There is nothing to show that an electronic change in the message once each hour, day, month, or year poses any distraction different from a billboard crew manually changing the vinyl cover of a conventional billboard.

Second, as a further litigation compromise while this case is pending, Clear Channel is willing to adjust the lighting of the billboards to any level determined by the Court. Clear Channel maintains that the illumination of the LED billboards is no different, or dimmer, than conventional lighting of billboards, which can be illuminated through electrical lighting. Clear Channel also points out that there are countless signs illuminated by electricity (including at least four other LED signs) throughout the City of Minnetonka, and that Minnetonka's refusal to allow Clear Channel to illuminate its two signs is a harsh and punitive measure.

Minnetonka rejoins that the four other LED signs are either "off-premises" and not on a major roadway, maintained by the Minnesota Department of Transportation for a public safety purpose, or electrical signs authorized before the December 18, 2006 moratorium. Minnetonka asserts that Clear Channel should not be allowed to benefit from its surreptitious and unlawful activation of the I-394 sign, in violation of the "motion" ordinance and Minnetonka electrical Code, and that to allow Clear Channel an exemption from the moratorium would in effect give it a monopoly in LED lighting, where other competitors would be barred under the moratorium from installing new LED billboard signs. Further, Minnetonka disagrees that the illumination of

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would still constitute prohibited motion.

<sup>6</sup> Because of this right, Clear Channel has standing to challenge the moratorium, and the Court rejects Minnetonka's argument to the contrary. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992) (discussing standing). Unlike the erection of a building in violation of a zoning ordinance, or some other object that cannot be easily changed, Clear Channel's signs can be modified so that the message remains static, and so that brightness, color, and illumination are calibrated to any lighting condition. Thus, even if Clear Channel's original LED with changing messages violated Minnetonka's ordinance, Clear Channel is still harmed by the moratorium's prohibition against operating the sign in a static condition. Clear Channel further has standing because its two billboards pre-date the emergency ordinance, and as discussed elsewhere, under Minnesota law Clear Channel has the right to make improvements or changes to the billboards.

the signs is equivalent to conventional lighting. The record before the Minnetonka City Council, and this Court, suggests that there are numerous and legitimate concerns about the lighting of the large billboard signs, particularly at night, and that at least at night, the lighting is arguably distracting and hard on the eyes.

The Court finds that with respect to illumination, the equities weigh with Clear Channel with respect to lighting during the daytime, and with Minnetonka with respect to lighting at night. There is nothing in the record to suggest that during daytime hours, a static sign illuminated by LED technology is any brighter or more distracting than a conventional billboard lit by electronic means. Clear Channel was permitted to operate its I-394 and I-494 billboards with conventional illumination prior to installing the LED technology in December 2006, and Minnetonka granted Clear Channel an electrical permit to increase the electrical capacity of the two signs. Subject to Clear Channel correcting the electrical code violations, there is no equitable reason why Clear Channel should risk further damage to the LED components, or loss of advertising good will and revenue, by keeping the billboards powered off during daytime hours, provided that the lighting is no greater than conventional billboard illumination, and that the advertising message is static.

However, because the record contains reasonable evidence that the illumination of the signs at night poses issues of driver safety, based upon the brightness, size, color, and illumination of the signs, the equities after daylight hours tilt toward Minnetonka. As discussed in more detail below, Minnetonka's emergency sign ordinance must have a reasonable relationship to public health, safety, or general welfare, and must be supported by "any set of facts either known or that could reasonably be assumed." *Thul v. State*, 657 N.W.2d 611, 617 (Minn. App. 2003), *review denied* (May 28, 2003). The record contains sufficient evidence to justify a reasonable concern that the illumination of the signs after daylight hours poses issues of

driver distraction and safety; the record does not contain such evidence during daylight hours.

**b. The Balance of Harms**

The Court incorporates its discussion of the balance of harms from its January 30, 2007 order. The Court finds, for the reasons described under the relationship of the parties, that the balance of harms tilts toward Clear Channel during daytime hours, and Minnetonka during nighttime hours. As noted in the January 30, 2007 decision, Minnetonka is entitled to enforce its 41-year old sign ordinance prohibiting signs which employ motion. However, a sign which is static, or which changes every hour, cannot reasonably be construed to represent motion, and a sign which is equivalent in daytime illumination to the pre-existing conventional signs represents no harm to Minnetonka. Static, electronically-lit signs were not unlawful under Minnetonka's 41-year old ordinance, and Minnetonka approved electrical permits that allowed Clear Channel to upgrade its electrical capacity to 300 amps. There is no significant evidence before the Court which suggests that a static sign illuminated to the same lighting as a conventional non-LED billboard poses any danger during daytime hours.

In contrast, Clear Channel will suffer a daily economic harm through damage to its reputation and loss of advertising good will and income, as well as possible damage to the LED electrical components, if the signs remain completely dark. Moreover, there is evidence in the record to support Clear Channel's contention that Minnetonka's current motivation in keeping the signs dark is partly to punish Clear Channel and to set an example. The Court agrees with Clear Channel that a desire to punish is not a proper justification for invoking the City's powers to enact an emergency moratorium. *See Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976) (holding that an emergency moratorium must be "enacted in good faith and without discrimination"). While Minnetonka has supplied evidence that at least one other business has been denied permission to install an LED sign under the moratorium, the record also reflects that

numerous businesses operate signs with electronic displays; that Minnetonka itself operates an LED display in front of its City Hall; and that Minnetonka's City Planner has admitted that LED technology applied to signs was not by itself unlawful under Minnetonka's sign ordinance, prior to the moratorium.<sup>7</sup>

On the other hand, the Court agrees with Minnetonka that it has a legitimate and proper purpose in studying the new LED technology before its landscape is enveloped by large electronic billboards; that there is substantial evidence in the record of Minnetonka's good faith desire to study the issue in a reasoned and deliberate way; that Minnetonka can adopt zoning regulations which regulate billboard use if related to public health, safety, and welfare; and that it would be improper to give Clear Channel a monopoly on the LED signs while other potential new entrants to the market (who have not violated Minnetonka's ordinance) are barred by the moratorium.

Balancing the harms, the Court concludes that upholding the moratorium in general but limiting its application to reflect the strengths and weaknesses of the parties' position is fair and equitable, in light of the Court's task under Minn. R. Civ. P. 65, which is to decide what interim relief, if any, is appropriate while the litigation goes forward. With respect to daylight hours, the balance of harms favors Clear Channel. During nighttime hours, because of the dangers of bright illumination and distraction at night which are supported by evidence in the record, and which were reasonably debated and supported before the Minnetonka City Council when it adopted its moratorium, the balance of harms favors Minnetonka.

**c. Likelihood of Success on the Merits**

The Court has previously concluded that Minnetonka has a reasonable likelihood of success on the merits with respect to whether Clear Channel's signs – brilliantly-lit and changing

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<sup>7</sup> As noted elsewhere and in previous orders, Minnetonka's concern with the LED signs related to motion, color,

every eight seconds – violate Minnetonka’s sign ordinance. The Court has also previously concluded that the moratorium, with its language permitting changes every hour, is a valid exercise of Minnetonka’s police powers.

The question of whether the emergency moratorium is a reasonable exercise of police powers by banning “any electronic display” presents a more difficult question. A statute or ordinance that constitutes an unreasonable exercise of municipal police powers violates the due process clause of the Constitution. *State v. Hyland*, 431 N.W.2d 868, 872 (Minn. App. 1988). An ordinance is unreasonable if it has no substantial relationship to “public health, safety, morals, or general welfare.” *Id.* If the “reasonableness of an ordinance is debatable, courts will not interfere with the legislative discretion.” *Id.* There must be at least a reasonable relationship between the ordinance and the promotion of health, safety, public morals, or general welfare. *Naegele Outdoor Adver. Co. v. Village of Minnetonka*, 162 N.W.2d 206, 212 (1968). The ordinance need only be supported by “any set of facts either known or that could reasonably be assumed.” *Thul*, 657 N.W.2d at 617.

In this case, the Court has already concluded that Minnetonka’s ordinance is reasonable to the extent it prohibits Clear Channel’s signs which change every eight seconds, particularly in light of the language of the December 18, 2006 ordinance which allowed messages to change once each hour. The new focus on the language banning “any electronic display,” and the amended moratorium removing language allowing changes each hour, is reasonable to the extent that the record reflects a concern over illumination and brightness of color. There is nothing in the record, however, which shows a public safety justification for barring such signs during daytime hours if the signs are static, and of the same brightness and illumination as conventionally-lit signs. The record does reflect that it is at least “reasonably debatable” whether



the brightness and illumination pose a public safety risk after daytime hours, and thus, the moratorium has a legitimate relationship to public safety, and is likely to be ultimately upheld, during nighttime hours.<sup>8</sup>

The Court recognizes Minnetonka's right to adopt an interim zoning ordinance that affects all applicants equally. See *Bartheld v. County of Koochiching*, 716 N.W.2d 406, 410 (Minn. App. 2006) (construing a moratorium as an interim zoning ordinance affecting all applicants as a legislative act). The Court also recognizes that preserving the status quo is a classic objective of an interim zoning moratorium. See *Carl Bolander & Sons, Inc. v. City of Minneapolis*, 378 N.W.2d 826, 830 (Minn. Ct. App. 1985) (concluding that the city's moratorium was legitimate under its police power and constituted a reasonable freeze of the status quo). However, in this case, the status quo gave Clear Channel the right to maintain the two billboards at I-394 and I-494 with conventional vinyl and electronic lighting. The status quo prior to the moratorium also reflects that LED technology was not unlawful under Minnetonka's sign ordinance; that Clear Channel had the right to improve or upgrade the two billboard signs; and that Clear Channel had a permit from Minnetonka to upgrade both the weight-bearing and electrical capability of the two signs. What Clear Channel lacked under the status quo was the right to operate the signs in a manner that reflected motion.

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<sup>8</sup> Minnetonka has not asserted that the emergency moratorium ordinance is based on aesthetic considerations, but rather has consistently asserted that the basis for the moratorium is public safety and driver distraction based on bright or moving signs. The Court has thus evaluated the moratorium in light of its stated purpose. Of course, a desire to achieve aesthetic ends would not invalidate an otherwise ordinance, if the zoning ordinance is reasonably related to the general health, safety, and welfare of the community. See *Naegele Outdoor Adver.*, 162 N.W.2d 206, 212 (Minn. 1968) ("[I]f the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police-power objective, the mere fact that aesthetic considerations were a significant factor in motivating its adoption cannot justify holding it unconstitutional."); *State v. Steele*, No. A05-2254, 2007 WL 46054, at \*1 (Minn. App. Jan. 9, 2007) ("Generally, we will not deem an ordinance based solely on aesthetic considerations to have a legitimate government purpose, but we will uphold an ordinance based in part on aesthetic considerations in addition to other legitimate purposes."); see also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-809 (1984) (upholding ordinance that prohibited the posting of signs on public property, and reaffirming decisions that state may legitimately exercise its police powers to advance aesthetic values); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (upholding city's prohibition of certain forms of outdoor billboards in order to avoid clutter).



The supplemental record of the December 18, 2006 City Council meeting reflects a thoughtful debate by the Council members and Mayor, with a Clear Channel representative present. The Council and Mayor discussed the issues thoroughly, and ultimately concluded that the LED technology was simply new and unlike any other billboard technology, and presented substantial concerns about brightness, illumination, and motion that warranted further study before Minnetonka faces a new wave of LED sign applications. Minnetonka rightfully concluded that it was unwilling to grant Clear Channel the right to operate the two signs simply because it had unlawfully activated at least one of the signs, and installed the signs without advance notice.

Despite this evidence of rationality and good faith, it is also true that nothing in the record before this Court explains why Clear Channel's two signs present an issue of public safety, health, or welfare if they are operated in a static mode, at illumination equivalent to conventional signs, during daytime hours. While Minnetonka may legitimately adopt an interim zoning ordinance to study the issue, this Court must also decide whether the interim effect on the ordinance on Clear Channel operates to unlawfully deprive it of the right to install signs that were originally lawful prior to the moratorium – provided that they involved no motion. Now that Clear Channel has been precluded from operating the signs with message changes every eight seconds as it originally desired, and looking to its interim litigation compromise, the record is barren of any evidence that a static sign has any negative effect on public safety during daytime hours, or that it adversely affects public health, safety, and welfare. Even broadly construed, and looking only at possible aesthetic concerns about the signs as matters of public health, safety, and welfare, the fact remains that on this record, Minnetonka does not argue that it is motivated by aesthetic concerns. On balance, accordingly, the Court concludes that the daytime moratorium, as applied to Clear Channel's offer to operate static signs at normal illumination, is unreasonable

and not supported by the record. *See County of Morrison v. Wheeler*, 722 N.W.2d 329, 334 (Minn. Ct. App. 2006) (an ordinance is reasonable “if its reasons are legally insufficient or if the decision is without factual basis”) (citation omitted).

The Court has not, by this conclusion, issued a declaratory judgment that the moratorium is generally invalid either as to daytime or nighttime signs. The case is still at an early stage of development, with discovery incomplete, and trial months in the future. Applying the preliminary analysis required under Minn. R. Civ. P. 65, the Court simply concludes that there is no reasonable connection between safety and Clear Channel’s illumination of static signs at a conventional level of billboard lighting during daytime hours.<sup>9</sup> Applying the same preliminary analysis to nighttime lighting, the Court concludes that there is a reasonable relationship between the moratorium and the ban on the LED signs at night, until the means of measuring brightness and color, and determining what is safe and non-distracting, can be studied further.

#### **d. Public Policy**

The Court adheres to the conclusion in its January 30, 2007 order that Minnetonka has the right to enforce its 41-year old ordinance prohibiting billboards which contain changing illumination and content. The Court also concludes, however, that, as previously discussed in the Court’s January 30 decision, Clear Channel is entitled to repair, replace, restore, maintain, or improve the two I-394 and I-494 signs under Minn. Stat. § 462.357. *See* (Order at 15, Jan. 30, 2007.) The equities with respect to public policy weigh in favor of Clear Channel improving an existing use of the two billboards, provided that Clear Channel does so in compliance with City Code § 300.02 (117), which prohibits “any illuminated sign on which such illustration is not kept

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<sup>9</sup> The Court recognizes that Minnetonka might believe that this formulation “begs the question.” However, Clear Channel has made a strong record that the LED signs present no illumination different from conventional billboard lighting during daytime hours, and the record contains scant or no evidence which contradicts Clear Channel’s position. Following discovery and trial, the record may ultimately establish that the two LED signs contain unduly bright illumination, color, or brightness during daytime hours. However, for the purpose of Clear Channel’s motion

stationary or constant in intensity at all times when such sign is in use.” City Code § 300.02 (117). The equities with respect to public policy also support Minnetonka in adopting an electronic display moratorium if the display presents issues of brightness, color, or illumination.

On this record, Minnetonka has set forth a substantial public safety rationale which justifies the moratorium at night, where the record reflects “reasonably debatable” concerns about the effect of brightness, color, and illumination. As noted earlier, the record is barren of a rational public safety concern during daytime hours, when the record shows a complete lack of any reasonable evidence that a static electronic sign with illumination equivalent to non-LED technology poses any danger to public safety. Thus, the public policy equities tip toward Minnetonka during nighttime hours, and Clear Channel during daytime hours.

**e. Administrative Burden Related to Judicial Supervision of a Temporary Decree**

The Court previously concluded in its January 30, 2007 order that Clear Channel’s motion asking to complete the electrical inspection process and activate the billboards would involve little or no judicial oversight.

Similarly, Clear Channel’s compromise proposal to operate the signs with messages changing on a frequency prescribed by the Court would not involve any significant judicial oversight, particularly if the Court adheres to the language in Minnetonka’s December 18, 2006 moratorium which allowed signs to change once each hour. On the other hand, the Court foresees potential risk of substantial judicial oversight if issues develop about the illumination, brightness, and color of the signs operated during both nighttime and daytime hours. Clear Channel maintains that the signs pose no risk to driver safety during nighttime or daytime hours.

The Court concludes that the record shows no risk that static signs of an illumination

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for a preliminary injunction, the current record supports its position that the daytime lighting of the signs is at a level equivalent to conventional billboard lighting, with respect to illumination, color, and brightness.

equivalent to conventional billboard lighting will endanger public safety during day time hours. To permit the signs to operate during daytime hours at conventional illumination should impose little administrative burden on the Court. In contrast, the Court finds that color, brightness, and illumination pose substantial issues that would require substantial judicial oversight during nighttime hours, both as to how these elements would be measured, and what constitutes distracting or dangerous color, brightness, and illumination. The record reflects a reasonable concern about illumination, color, and brightness at night, and this issue is suited toward legislative study by Minnetonka, rather than oversight and study by the Court.

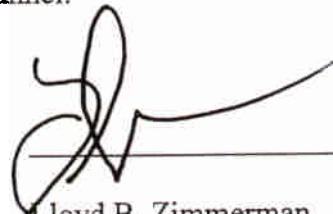
For the reasons stated above, based upon the record and the arguments of counsel:

IT IS ORDERED:

- 1) Clear Channel's motion for reconsideration is granted in part and denied in part. The Court's January 30, 2007 order shall remain in full force and effect except as expressly modified below.
- 2) Minnetonka is preliminary enjoined from implementing, sanctioning, continuing in effect, or enforcing a Stop Work Order on Clear Channel's two LED signs on I-494 and I-394 in Minnetonka.
- 3) Minnetonka is directed to proceed with the final inspection of Clear Channel's signs to determine whether they comply with Minnetonka's Electrical Code, and to permit Clear Channel to take corrective action to bring the signs into compliance with Minnetonka's Electrical Code.
- 4) Provided that the signs pass a final electrical inspection, Minnetonka is preliminarily enjoined from interfering with the operation of the two LED signs at I-394 and I-494 during daytime hours, to the extent that (a) the electronic messages on the sign change no more than once each hour (b) the

brightness, color, and illumination of the signs are calibrated by Clear Channel to the minimal level of illumination equivalent to conventional non-LED electronic billboard signs. Pending the outcome of this litigation, Clear Channel is enjoined from operating the two signs before or after day-light hours.<sup>10</sup>

- 5) Minnetonka is preliminarily enjoined from enforcing its moratorium or City Code § 300.02 (117) and § 300.30((1)(b)-(c) against Clear Channel in a manner inconsistent with this decision.
- 6) No bond shall be required of Clear Channel.

  
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Lloyd B. Zimmerman  
Judge of District Court

Dated: March 6, 2007

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<sup>10</sup> The Court defines day-light hours to coincide with standard tables defining sunrise and sunset. For example, according to a standard table, sunrise on March 5, 2007 commences at 6:44 a.m., and sunset on that date commences at 6:05 p.m. Sunrise and sunset change according to the season, and thus, for example, by the same table, sunrise on March 31, 2007 is at 6:56 a.m., and sunset is at 7:39 p.m. See Sunrise and Sunset in St. Paul, <http://www.timeanddate.com/worldclock/astronomy.html?n=219> (last accessed on Mar. 2, 2007).